

Papool S. Chaudhari (California Bar No. 241346, admitted to this Court)  
Papool@ChaudhariLaw.com  
CHAUDHARI LAW, PLLC  
P.O. Box 1863  
Wylie, Texas 75098  
Telephone: (214) 702-1150  
Facsimile: (214) 705-3775

Attorney for Plaintiff,  
**PERSONAL AUDIO, LLC**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

PERSONAL AUDIO, LLC,  
  
Plaintiff,  
v.  
TOGI ENTERTAINMENT, INC. et al.  
  
Defendant.

ACTION NO. 3:14-mc-80025-RS

**PLAINTIFF'S OPPOSITION TO  
THIRD PARTY ELECTRONIC  
FRONTIER FOUNDATION'S  
MOTION TO QUASH AND FOR  
PROTECTIVE ORDER**

Date: Wednesday, Mar. 5, 2014

Time: 1:00 p.m.

Dept.: Courtroom A, 15<sup>th</sup> Floor

Judge: Honorable Nathanael Cousins

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1 1. INTRODUCTION<sup>1</sup>

2 Despite the EFF's rhetoric about being a nonprofit digital civil liberties organization, the  
 3 EFF—in practice—is little more than an organization that seeks to obstruct discovery in intellectual  
 4 property litigation matters as evidenced by its webpage dedicated to helping people quash  
 5 subpoenas. *See* Declaration of Papool S. Chaudhari ("Chaudhari Decl.") at ¶ 12, Exhibit 6.  
 6

7 In this matter, almost immediately after Personal Audio filed its first lawsuits in Texas  
 8 concerning the '504 patent, the EFF launched a public campaign seeking to invalidate the patent.  
 9 This culminated in a filing of an *Inter Partes* Review, suspiciously six days after Defendants in the  
 10 Texas case served their Invalidity Contentions. It is no surprise that the IPR petition only consists of  
 11 prior art that was disclosed in these Invalidity Contentions.  
 12

13 In light of the EFF's IPR petition, Personal Audio seeks proper discovery on: (1) to what  
 14 extent the EFF—in filing an IPR against Personal Audio in the USPTO—is acting under the control,  
 15 direction and/or influence of any Defendant in the Texas case; and (2) the nature and basis of the  
 16 EFF's prior art arguments that were raised in its IPR petition. If any Defendant in the Texas case is  
 17 or was involved in the IPR, estoppel under 35 U.S.C 315(e)(2) would apply and such Defendant  
 18 cannot raise invalidity arguments in the Texas case that were or should have been brought in the  
 19 IPR. As to the prior art arguments, the EFF is seeking, through this collateral attack, to prevent  
 20 Personal Audio from being able to defend its intellectual property rights. Meanwhile, the EFF  
 21 believes it should be immune from having to answer anything in those litigations it seeks to nullify.  
 22

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23 <sup>1</sup> This opposition is being timely filed on February 18, 2014. The motion was filed on January 29, 2014, but as  
 24 the case was not set up in ECF and no attorney for Personal Audio, LLC had (naturally) made an appearance when the  
 25 motion was filed, the motion was hand filed and served via e-mail by agreement of the parties pursuant to FRCP  
 26 5(b)(2)(E). N.D. Cal. Local Rule 7-3(a) requires that an opposition must be served not more than 14 days after the  
 27 motion is filed unless the motion was not filed and served via ECF and rather served in an alternative method, such as  
 28 FRCP 5(b)(2)(E), in which case three additional days are added by the Court per L.R. 7-3(a). Fourteen days after  
 Wednesday, January 29, 2014 was February 12, 2014. Three additional days brought the deadline to Saturday, February  
 15, 2014. As the following Monday, February 17, 2014, was the Federal Court Holiday of President's Day, this  
 opposition is timely filed on Tuesday, February 18, 2014.

1 This Court should not let the EFF have its cake and eat it too. If the EFF wants to attack invalidity  
2 of a patent for the sole and stated purpose of ending current and future litigations concerning the  
3 same patent, the EFF should be required to give discovery (for use in the district court litigation) as  
4 to why they believe the patent is invalid. The EFF provides no authority (nor has Personal Audio  
5 found any) that supports the proposition that a third party who initiates an IPR is somehow immune  
6 to discovery in a district court litigation concerning the same patent.  
7

8       There is also no merit to the EFF's First Amendment Privilege Argument. *Perry v.*  
9 *Schwarzenegger* does not apply because the EFF cannot make the requisite prima facie showing.  
10 The EFF, in its motion, freely admits that not all donors are members, which this Court has held  
11 severely undercuts the First Amendment argument. *See Chevron Corp v. Donziger*, 3:12-mc-80237-  
12 CRB, Document #70, at p. 15 (N.D. Cal. Aug. 22, 2013) (Cousins, M.J.). Additionally, the EFF's  
13 own privacy policy warns donors that their information may be disclosed pursuant to subpoena,  
14 which California courts have held rescinds the expectation of privacy. *See Willard v. AT&T*  
15 *Commc'ns of Cal., Inc.*, 204 Cal. App. 4th 53, 62 (Cal. Ct. App. 2012). Further, the protective order  
16 in the Texas case, using the "Attorneys Eyes Only" designation, would limit the disclosure of  
17 information to the attorneys in the case, which the *Perry* court held to be a mitigating factor in  
18 determining whether there was a "chilling effect."  
19

20  
21       The EFF's claims concerning attorney-client privilege, work product doctrine, and  
22 unretained expert opinion are unsupported and the EFF provides no information to the Court or  
23 Personal Audio to make the determination that such information falls into these categories.  
24

25       Finally, the subpoena is not an "end-run" around the IPR's discovery limits because the  
26 subpoena is for discovery to be used in the Texas case only, and, as the EFF points out, Personal  
27 Audio is restricted by a protective order in the Texas case that would only allow it to use this  
28

1 discovery in the Texas case. Despite Ms. Ranieri's assertions, counsel for Personal Audio Jeremy  
2 Pitcock did not state that Personal Audio was going to use this discovery in the IPR. In fact, Jeremy  
3 Pitcock and the undersigned are prohibited from having any involvement in the IPR per the same  
4 protective order.

5  
6 As the subpoena calls for information (to be used in the Texas case) that goes to (1) what  
7 extent the EFF—in filing an IPR against Personal Audio in the USPTO—is acting under the control,  
8 direction and/or influence of any Defendant in the Texas case; and (2) the nature and basis of the  
9 EFF's prior art arguments that were raised in its IPR petition, it is a proper subpoena and the Court  
10 should require the EFF to promptly comply with the subpoena.

## 11 2. BACKGROUND FACTS

12  
13 On January 7, 2013, Personal Audio filed patent infringement suits in the Eastern District of  
14 Texas (the "Texas case") against Togi Entertainment, Inc.; Ace Broadcasting (then believed to be  
15 the parent entity for Adam Carolla's podcasts), and HowStuffWorks alleging infringement of U.S.  
16 Patent 8,112,504 ("504 Patent" or "patent-in-suit"). *See* Civil Action Nos. 2:13-cv-13, 2:13-cv-14,  
17 and 2:13-cv-15, all pending in the Eastern District of Texas. The Electronic Frontier Foundation  
18 ("EFF") soon after created a webpage on its site called the "Patent Busting Project – An EFF  
19 Initiative to Protect Innovation and Free Expression" identifying Personal Audio and the '504  
20 Patent, and accusing Personal Audio of "Crimes Against the Public Domain." *See* Chaudhari Decl.  
21 at ¶ 7, Exhibit 1.

22  
23 In February 2013, before anything of significance occurred in the Texas case, EFF attorney  
24 Daniel Nazer—who submitted an affidavit in support of this motion—stated that "[w]e think  
25 Personal Audio's podcasting claims are a classic example of an over-broad software patent . . . . But  
26  
27  
28

1 whether these claims would hold up in court is another question and one that is too early to speculate  
2 on.” *See id.* at ¶ 8, Exhibit 2.

3 In April 2013, Personal Audio filed patent infringement suits in the Eastern District of Texas  
4 against NBC and CBS alleging infringement of the ‘504 Patent. *See* Civil Action Nos. 2:13-cv-270,  
5 2:13-cv-271, both pending in the Eastern District of Texas. In August 2013, Personal Audio filed a  
6 patent infringement suit against FOX alleging infringement of the ‘504 Patent. *See* Civil Action No.  
7 2:13-cv-577, pending in the Eastern District of Texas. This was preceded by FOX filing a  
8 declaratory judgment action concerning the ‘504 Patent in the District of Massachusetts  
9 (“Massachusetts case”).  
10

11 In approximately May 2013, the EFF created a fundraising web page called “Save  
12 Podcasting—Stop Stupid Patents!” asserting that the patent-in-suit is “bogus” and “overbroad” and  
13 that with the money raised, the EFF would “get to work bringing the best case we can straight to the  
14 US Patent Office to invalidate the podcasting patent and stop the patent troll Personal Audio from  
15 doing more damage to online broadcasters.” *See* Chaudhari Decl. at ¶¶ 9-10, Exhibits 3-4.  
16

17 In August 2013, the majority of Personal Audio’s patent infringement actions in Texas were  
18 consolidated for pre-trial purposes. *See* 2:13-cv-13, Document #12 (E.D. Tex.). Consolidated  
19 Defendants were required to, and did, serve invalidity contentions on October 10, 2013. *See*  
20 Excerpts from Defendants’ Invalidity Contentions from 2:13-cv-13 (E.D. Tex.), attached as Exhibit  
21 8 to the Chaudhari Decl.  
22

23 Six days later—on October 16, 2013—the EFF filed an *Inter Partes* Review (“IPR”) in the  
24 United States Patent and Trademark Office concerning the ‘504 Patent. *See* EFF’s IPR petition,  
25 attached as Exhibit 9 to the Chaudhari Decl. Using several prior art references that were disclosed  
26  
27  
28

1 six days earlier in Defendants' Invalidity Contentions, the EFF contends to the USPTO that the '504  
2 Patent is invalid over this prior art. *See id.*

3 On December 20, 2013, counsel for Personal Audio issued a subpoena to the EFF for  
4 deposition and listed a small number of topics related to the EFF's contention of invalidity and  
5 whether the EFF was acting under the control, direction or influence of any Defendants in the Texas  
6 case when it filed the IPR. *See* Original Subpoena to EFF, attached as Exhibit 10 to the Chaudhari  
7 Decl. As this subpoena was issued from this Court, and not the Eastern District of Texas as required  
8 under a recent amendment to the Federal Rules of Civil Procedure, Personal Audio reissued the  
9 subpoena on January 17, 2014 for compliance on January 31, 2014. *See* Reissued Subpoena to EFF,  
10 attached as Exhibit 11 to the Chaudhari Decl. The topics were slightly revised and also the  
11 Subpoena was broadened to include Defendants who had recently been consolidated into the Texas  
12 case. *See id.* Two days before the January 31 deadline for compliance—January 29, 2014—the EFF  
13 filed this motion.  
14  
15

### 16 3. ARGUMENTS AND AUTHORITIES

#### 17 a. Personal Audio's subpoena seeks information highly relevant to the Texas Case

18 At its core, Personal Audio's deposition topics seek the following discovery in light of the  
19 EFF's IPR petition, which it filed a mere six days after Defendants filed their Invalidity Contentions  
20 in the Texas case: (1) to what extent the EFF—in filing an IPR against Personal Audio in the  
21 USPTO—is acting under the control, direction and/or influence of any Defendant in the Texas case;  
22 and (2) the nature and basis of the EFF's prior art arguments that were raised in its IPR petition.  
23  
24

#### 25 1. To what extent the EFF is acting under the control, direction 26 and/or influence of any Defendant in the Texas case is extremely relevant 27 28



1 All Defendants in the Texas case have raised the affirmative defense of invalidity and nearly  
 2 all have counterclaimed that the patent-in-suit is invalid. *See* 2:13-cv-13, Document # 5; 2:13-cv-14,  
 3 Document # 12; 2:13-cv-15, Document # 10; 2:13-cv-270, Document # 9; 2:13-cv-271, Document #  
 4 9; 2:13-cv-577, Document # 9 (Answer only). However, under Federal statute, “[t]he petitioner in  
 5 an inter partes review of a claim in a patent ... or the real party in interest or privy of the petitioner,  
 6 may not assert either in a civil action ... that the claim is invalid on any ground that the petitioner  
 7 raised or reasonably could have raised during that inter partes review.” 35 U.S.C 315(e)(2)  
 8 (emphasis added). Practically speaking, this means if a Defendant in a district court litigation seeks  
 9 an IPR on the same patent, that Defendant would be foreclosed from making, in the Texas case, the  
 10 arguments it made or could have made in the IPR. This prevents Defendants from having two shots  
 11 in different tribunals at invalidating a patent over prior art, and requires Defendants to be bound by  
 12 the decision in the IPR.  
 13  
 14

15 As to what constitutes a “real party in interest, the USPTO has stated:

16 Who constitutes a real party in interest or privy is a highly fact-dependent question,  
 17 especially on the issue of whether a party who is not a named participant in a given  
 18 proceeding nonetheless constitutes a “real party in interest” or “privy” to that  
 19 proceeding. Courts and commentators agree that there is no “bright-line test” for  
 20 determining the necessary quantity or degree of participation to qualify as a “real  
 21 party in interest” or “privy” based on the control concept. *See Gonzalez v. Banco*  
 22 *Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994); *see also* Wright & Miller § 44512  
 23 (“The measure of control by a nonparty that justifies preclusion cannot be defined  
 rigidly.”). Accordingly, the Office has not enumerated particular factors regarding a  
 “control” theory of “real party in interest” or “privy” in the proposed rules. Instead,  
 to resolve a real party in interest or privy dispute that may arise during a proceeding,  
 the Board plans to consider each case on its specific facts.

24 Statement from BPAI Chief Judge James Donald Smith, Chaudhari Decl. at Exhibit 13. This alone  
 25 suggests that the Personal Audio should be able to take sufficient discovery to determine which, if  
 26 any, Defendants in the Texas case are the real party in interest in this IPR filed by the EFF.  
 27  
 28

1 The USPTO has also stated that a petitioner, such as the EFF, in a re-examination or IPR  
2 cannot do any of the following without identifying the real party in interest:

3 “1. Accept payment from another group, pay the requester to file the request for *inter*  
4 *partes* reexamination and have itself named solely as the real party in interest.

5  
6  
7 2. Obtain money for foundation grants, file a “*quid pro quo*” request for an *inter*  
8 *partes* reexamination where the foundation wants reexamination on a specific patent  
9 that the foundation deems anti-competitive and name itself solely as the real party in  
10 interest.

11 3. Allow another entity to direct or control the content (e.g., provide the prior  
12 patents/printed publications on which the reexam is to be based) of the request  
13 whether such is termed “technical review” or some other phrase.”

14 *In re Guan Inter Partes Reexamination Proceeding*, Control No. 95/001,045, Decision Vacating  
15 Filing Date, at 8 (U.S.P.T.O. Aug. 25, 2008).

16 Thus, to the extent the EFF is or was acting under the control, direction and/or influence of  
17 the Defendants in filing the IPR against Personal Audio (or was paid to file an IPR, or filed it on a  
18 *quid pro quo* basis), that would also make any such Defendants “the real party in interest” in the  
19 IPR. Accordingly, such Defendants would be prohibited from asserting invalidity defenses in the  
20 Texas case that were or could have been raised in the IPR. Topics 1 (communications with  
21 Defendants Concerning the ‘504 Patent); 5 (fundraising activities in connection with this IPR  
22 Concerning the ‘504 Patent); and 6 (all steps taken by the EFF to be “fully prepared” to take on  
23 Personal Audio with respect to the ‘504 Patent) are directed to this issue.

24 In practice, this would have an enormous impact on the Texas case. As the EFF IPR petition  
25 could have raised any and all prior art arguments that were raised in Defendants’ Invalidity  
26 Contentions, if Defendants are “the real party in interest” in the IPR, the effect of 35 U.S.C  
27 315(e)(2) would mean that Defendants’ invalidity defenses and counterclaims in the Texas case  
28

1 based on prior art would *have* to be dismissed because the Defendants in this situation would be  
2 bound by the decision in the IPR. Although this IPR appears to be running concurrently with the  
3 Texas case, the nature of the Texas case would be substantially different if Defendants are estopped  
4 from arguing invalidity over the prior art in that case. Essentially, Defendants would have to only  
5 defend against the claims in the Texas case on the basis of non-infringement and leave the validity  
6 fight to the IPR before the USPTO. It would affect the likelihood of the case getting to trial and the  
7 verdict itself, since the jury would not hear the majority of Defendants' invalidity arguments. This  
8 alone is a compelling the reason the subpoena should not be quashed.

10 Additionally, even more troubling is that two Defendants thus far—NBC and CBS—are  
11 refusing to answer discovery in the Texas case related to their communications with the EFF  
12 concerning the '504 Patent. *See* NBC and CBS' Responses to Interrogatory No. 1 in 2:13-cv-13,  
13 attached as Exhibit 12 to the Chaudhari Decl. The EFF, in bringing this motion to quash, raises  
14 suspicions that it is hiding this relevant discovery. The fact that two Defendants are refusing to give  
15 discovery on their relevant communications with the EFF raises even more suspicions. If the EFF  
16 was acting without any involvement from Defendants, the EFF should have no issue disclosing this  
17 to Personal Audio, nor would any Defendant have issue with disclosing that they had no  
18 involvement with the EFF concerning this patent.<sup>2</sup> While Personal Audio is seeking to resolve its  
19 discovery dispute with Defendants in the Texas case, this Court nevertheless should not allow the  
20 EFF to get away with not providing Personal Audio the necessary discovery to determine if they  
21 have been acting under the control, direction or influence of any Defendant in the Texas case to find  
22 out whether, per 35 U.S.C 315(e)(2), any estoppel has been triggered that would necessarily have a  
23 major impact on the Texas case.

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27  
28 <sup>2</sup> Indeed Defendants Togi Entertainment, Inc. and HowStuffWorks have stated in discovery that they have had no communications with the EFF concerning the patent-in-suit.

**2. The nature and basis of the EFF's prior art arguments that were raised in its IPR petition**

Personal Audio filed patent infringement suits against several Defendants in the Texas case. Those Defendants claim the patent-in-suit is invalid. Assuming, *arguendo*, that the EFF was not acting under the control, direction or influence of any Defendant, the EFF still inserted itself into this litigation by initiating a collateral attack on the validity of the patent via the USPTO.

Soon after Personal Audio filed its initial round of suits concerning this patent, the EFF had created a "Patent Busting Project" webpage concerning the patent-in-suit accusing Personal Audio of "Crimes against the Public Domain." *See* Chaudhari Decl. at ¶ 7, Exhibit 1. In approximately May 2013, the EFF created a fundraising web page called "Save Podcasting—Stop Stupid Patents!" asserting that the patent-in-suit is "bogus" and "overbroad" and that with the money raised, the EFF would "get to work bringing the best case we can straight to the US Patent Office to invalidate the podcasting patent and stop the patent troll Personal Audio from doing more damage to online broadcasters." *See id.* at ¶¶ 9-10, Exhibits 3-4.

In light of this, Personal Audio should be able to get discovery from the EFF as to the basis for its invalidity assertions. The nature and basis of those assertions are highly relevant to Personal Audio's defense against invalidity claims by the Defendants in the Texas case. As all of the prior art cited in the IPR petition was cited by Defendants six days earlier,<sup>3</sup> Personal Audio should be permitted to inquire directly to the EFF as to how they concluded that those pieces of prior art invalidate the patent and use such information in the Texas case. Topics 7 (identification of any information Concerning any prior art that would tend to show either that the art did not disclose any element of the claims or that the art was not demonstrably available prior to any filing date); 8 (any

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<sup>3</sup> Compare Chaudhari Decl., Exhibit 8 at p.21 (Geek of the Week), Chart A-1 (p. 43) (Surfpunk), Chart A-5 (p.73) (CBC Radio Article), Chart A-14 (p. 167) and Chart A-15 (p.184) (both Internet CNN Newsroom) with Chaudhari Decl., Exhibit 9 at 17-34 (Geek of the Week), 26-35 (Surfpunk), 35-44 (CBC Radio Article), and 45-59 (Internet CNN Newsroom).

1 non-privileged analysis or Communications concerning the claims, prior art, and meaning or  
 2 construction of any terms of the claims); 2 (communications between EFF and any actual/potential  
 3 witness concerning the ‘504 patent or prior art to same); 3 (communications between the EFF and  
 4 any third parties specifically Concerning the ‘504 patent); and 4 (non-privileged communications  
 5 regarding the prior art cited in any USPTO proceeding Concerning the ‘504 patent) are designed to  
 6 elicit this information.  
 7

8 As shown in the webpages directly from the EFF website attached to the Chaudhari  
 9 Declaration, the EFF raised money to file this IPR in an attempt to invalidate the patent-in-suit, and,  
 10 thus, “stop the patent troll Personal Audio from doing more damage to online broadcasters.” *See*  
 11 Chaudhari Decl. at Exhibit 4. In other words, the EFF is seeking, through this collateral attack, to  
 12 prevent Personal Audio from being able to defend its intellectual property rights. Meanwhile, the  
 13 EFF believes it should be immune from having to answer anything in those litigations it seeks to  
 14 nullify. This Court should not let the EFF “have its cake, and eat it too.” If the EFF wants to attack  
 15 invalidity of a patent **for the sole and stated purpose of ending current and future district court**  
 16 **litigations** concerning the same patent, the EFF should be required to give discovery (for use in the  
 17 district court litigation) as to why they believe the patent is invalid. The EFF provides no authority  
 18 (nor has Personal Audio found any) that supports the proposition that a third party who initiates an  
 19 IPR is somehow immune from discovery in a district court litigation concerning the same patent.  
 20  
 21

22 **b. There is no applicable First Amendment Privilege**

23 The EFF’s primary basis for seeking this motion to quash is its contention that there is a First  
 24 Amendment Privilege that applies to the relevant activities and that somehow the EFF can launch a  
 25 collateral attack on a patent to prevent current and future litigation on that patent, but somehow also  
 26 be shielded by the First Amendment from providing discovery to the very cases it wishes to put an  
 27  
 28

1 end to. *See* Motion at 8-15. The EFF heavily relies on *Perry v. Schwarzenegger*, 591 F.3d 1126  
2 (9th Cir. 2009), to support its argument.

3 Even assuming, *arguendo*, that *Perry* applies, the case: (1) is limited to “private, internal  
4 communications regarding formulation of strategy and messages” and “certainly does not apply to  
5 documents or messages conveyed to the electorate at large or individual voters for purposes of  
6 persuasion, recruitment, or motivation—activities beyond the formulation of strategy and  
7 messages”; and (2) is specifically limited to the “core group” of persons engaged in the formulation  
8 of campaign strategy and messages. *Perry*, 591 F.3d at 1165, n.12. If the EFF is correct, it should  
9 be compelled by this Court to identify this “core group” so the Court and Personal Audio can  
10 determine if any members of the core group are affiliated in any way with Defendants, so as to  
11 ascertain if 35 U.S.C 315(e)(2) estoppel applies to any Defendant in the Texas case.  
12

13  
14 Nevertheless, there is no applicable First Amendment privilege. A two-part test is used in the  
15 Ninth Circuit for analyzing claims of First Amendment associational privilege in discovery disputes.  
16 *See Perry v. Schwarzenegger*, 591 F.3d 1126, 1139-41 (9th Cir. 2009). “This prima facie showing  
17 requires [a party] to demonstrate that enforcement of the discovery requests will result in (1)  
18 harassment, membership withdrawal, or discouragement of new members, or (2) other consequences  
19 which objectively suggest an impact on, or chilling of, the members ‘associational rights.’” *Id.* at  
20 1140. This prima facie showing “turns not on the type of information sought, but on whether  
21 disclosure of the information will have a deterrent effect on the exercise of protected activities.” *Id.*  
22 at 1141; *Chevron Corp. v. Donziger*, 2013 WL 1402727, at \*2-\*3 (N.D. Cal. Apr. 5, 2013) (Cousins,  
23 M.J.).  
24

25  
26 The EFF has not made a prima facie showing of arguable First Amendment infringement.  
27 *See Perry*, 591 F.3d at 1139-41. The EFF admits in its motion that not all of the donors are  
28

1 “members” of the organization. *See* Motion at 11, Nazer Declaration at ¶16 (“Approximately 50% of  
 2 these donors [to EFF's Save Podcasting campaign] elected to become members of EFF (or were  
 3 already members) and approximately 50% individuals supported the campaign without electing to  
 4 becoming members.”). “This significantly undercuts their claim to protection under the First  
 5 Amendment.” *Chevron Corp v. Donziger*, 3:12-mc-80237-CRB, Document #70, at p. 15 (N.D. Cal.  
 6 Aug. 22, 2013) (Cousins, M.J.); *See Anderson v. Hale*, 2001 WL 503045, at \*6 (N.D. Ill. May 10,  
 7 2001) (denying motion to quash subpoena seeking identifying information, activity logs, and address  
 8 books associated with email accounts in part because subpoena did not target religious group  
 9 exclusively and would implicate others not affiliated with organization).  
 10

11 Moreover, disclosure of personal information pursuant to a subpoena is contemplated in the  
 12 EFF's own privacy policy and known to potential donors prior to the act of donation. *See* Chaudhari  
 13 Decl. at ¶ 11, Exhibit 5. The EFF website states the following:  
 14

15 [W]e may disclose personally identifiable information about you to third parties in  
 16 limited circumstances, including: (1) with your consent; or (2) when we have a good  
 17 faith belief it is required by law, such as pursuant to a subpoena or other judicial or  
 18 administrative order. If we are required by law to disclose the information that you  
 19 have submitted, we will attempt to provide you with notice (unless we are prohibited)  
 20 that a request for your information has been made in order to give you an opportunity  
 21 to object to the disclosure. We will attempt to provide this notice by email, if you  
 22 have given us an email address, or by postal mail if you have entered a postal  
 23 address. If you do not challenge . . . .

24 *Id.* (emphasis added). Compliance with a subpoena, therefore, will not have a chilling effect when  
 25 potential donors are informed, prior to donation, of this possibility. A warning to potential donors  
 26 rescinds the expectation of privacy. *See Willard v. AT & T Commc'ns of Cal., Inc.*, 204 Cal. App.  
 27 4th 53, 62 (Cal. Ct. App. 2012), *review denied* (Jun. 20, 2012) (California Court of Appeals  
 28 determined, without deciding “whether the privacy of one’s telephone listing is a legally protected  
 privacy interest,” that no violation of the right to privacy occurred because “plaintiffs did not expect

1 privacy in the circumstances, as they knew their listing would be public unless they paid a fee to opt  
 2 out of being listed.”). In fact, the EFF has not produced a single declaration from any of its  
 3 members, or potential members, that a limited disclosure will result in this “especially grave threat”  
 4 described in its motion to quash. *Perry*, 591 F.3d at 1163 (citing *Dole v. Service Employees Union*,  
 5 950 F.2d 1456, 1459–61 (9th Cir. 1991) (holding that the union satisfied its prima facie burden by  
 6 submitting the declarations of two members who said they would no longer participate in union  
 7 membership meetings if the disclosure of the minutes of the meetings were permitted)).

9 Additionally, under the shield of the protective order in Texas Case and using the highest  
 10 confidentiality designation (“Attorneys Eyes Only”), the only persons that will receive the EFF’s  
 11 donor list or otherwise will be the parties’ attorneys. “A protective order limiting the dissemination  
 12 of disclosed associational information may mitigate the chilling effect and could weigh against a  
 13 showing of infringement.” *Perry*, 591 F.3d at 1160, n.6. This extremely limited disclosure will not  
 14 result in harassment, membership withdrawal, and discouragement of new members. No showing of  
 15 such has been made by the EFF.  
 16

17 Accordingly, the EFF has not met the prima facie showing set forth in *Perry*. As the EFF  
 18 fails to satisfy this test, it cannot claim a First Amendment privilege to resist this discovery.  
 19

20 **c. The Subpoena does not require disclosure of attorney-client communications**  
 21 **and work product**

22 **1. Attorney-Client privilege**

23 The EFF points to Fed. R. Civ. P. 45(d)(3)(A)(iii) as the basis for quashing the subpoena,  
 24 which states that “... the court for the district where compliance is required must quash or modify a  
 25 subpoena that ... (iii) requires disclosure of privilege or other protected matter, if not exception or  
 26 waiver applies.” The party seeking to claim privilege, however, holds the burden of proof. *See U.S.*  
 27 *v. Graf*, 610 F.3d 1148, 1156 (9th Cir. 2010); *Weil v. Investment/Indicators, Research & Mgmt, Inc.*,  
 28



1 647 F.2d 18, 25 (9th Cir. 1981); *See also Matter of Bevill, Bressler & Schulman Asset Management*  
2 *Corp.*, 805 F.2d 120, 123 (3rd Cir. 1986). *See also United States v. Dakota*, 197 F.3d 821, 825 (6th  
3 Cir. 1999) (the party asserting the discovery privilege has the burden of establishing its existence).

4 The EFF raises summary objections to Personal Audio's subpoena based, in pertinent part,  
5 on specious, summary claims of Attorney Client privilege, work product privilege, and unretained  
6 expert opinion. *See* Motion at 15. The EFF states that topics 1 – 8 are protected by such privileges.  
7 *See id.* The EFF does not articulate any reasons or rationale as to why such communications are  
8 privileged, nor does it attempt to identify any specific communications subject to such privileges,  
9 including—incredulously—how communications between the EFF and other persons or entities  
10 regarding Personal Audio's intellectual property could raise any possible claim of privilege  
11 belonging to the EFF. Rather, the EFF simply raises a blanket claim of attorney-client privilege,  
12 work product privilege, and unretained expert opinion. The one exception and only specific claim of  
13 privilege noted in EFF's motion to quash are the communications to counsel at the Cyberlaw Clinic.  
14 The other communications sought by Personal Audio's subpoena are grouped wholesale into  
15 buckets of privilege claims without any identification or basis for privilege.

16 These claims of privilege are especially perplexing because there is no legitimate attorney-  
17 client privilege or work product privilege the EFF can claim to documents either it did not create, or  
18 did create but shared with third parties who do not have aligned interests with the EFF, especially  
19 third parties (Topic 3) who are not parties to this litigation or the pending IPR. The EFF's spurious  
20 claims of privilege and the summary manner in which such claims are made demonstrate its  
21 fundamental misunderstanding of both the showing necessary to support claims of privilege and  
22 protection and the proper scope and breadth of these privileges.

23 Moreover, summary unsupported claims of privilege without detailed descriptions of the  
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documents sought and explanations of *how* such documents are privileged, are insufficient to prove privilege and on this basis alone the motion should be denied. The entity seeking protection from production based upon “a claim that it is privileged or subject to protection as trial preparation materials . . . shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.” Fed. R. Civ. P. 45(d)(2). Moreover, as the Advisory Committee Note to Rule 45(d), explains “[Rule 45(d)(2)’s] purpose is to provide a party whose discovery is constrained by a claim of privilege or work product protection with information sufficient to evaluate such a claim and to resist if it seems unjustified.”

Further, third party disclosures automatically waive any claims to attorney-client privilege or work product privilege, unless a joint defense can be established. *See In re Pacific Pictures Corp.*, 679 F.3d 1121, 1127 (9th Cir. 2012); *Weil*, 647 F.2d at 24; *See also In re Lindsey*, 158 F.3d 1263, 1282, (D.C. Cir. 1998); *United States v. McPartlin*, 595 F.2d 1321, 1336-37 (7th Cir. 1979), cert. denied, 444 U.S. 833 (1980); *In re Grand Jury Investigation No. 83-2-35*, 723 F.2d 447 (6th Cir. 1983); *United States v. Lawless*, 709 F.2d 485, 487 (7th Cir. 1983); *In re Horowitz*, 482 F.2d 72, 81 (2nd Cir. 1973), cert. denied, 414 U.S. 867 (1973). As previously demonstrated, because the EFF: (1) is not and will not be a party to Personal Audio’s patent infringement suits; (2) does not share identical interests with the Defendants; and (3) does not face the same legal obligations as a Defendant in the patent infringement lawsuit, any communications between the Defendants and the EFF (much less between the EFF and other third parties) are not protected by a joint defense privilege. Thus, EFF cannot freely exchange documents with these third parties and then validly claim privilege for those documents. The general rule is that a “party cannot disclose only those

1 facts beneficial to its case and refuse to disclose, on the grounds of privilege, related facts adverse to  
 2 its position.” *Ortho Pharmaceutical Corp. v. Smith*, 959 F.2d 936, 944 (Fed.Cir.1992).

## 3 **2. Attorney Work Product**

4 The EFF asserts that all information sought by topics 1 – 8 in the subpoena are generated in  
 5 anticipation of litigation and therefore privileged as work product. *See* Motion at 15. However, the  
 6 EFF again does not indicate in any specificity which documents or communications this implicates,  
 7 when these items were prepared, or the date that such preparation began. *See In re Rail Freight Fuel*  
 8 *surcharge Antitrust Litigation*, 268 F.R.D. 174, 118 (D.D.C. 2010). The communications requested  
 9 in topics 1 – 4 do not, in any way, relate to this alleged privilege raised by the EFF. Neither does the  
 10 fundraising activity requested by topic 5. Claiming privilege for all items implicated by topics 6 – 8  
 11 also appears suspect. The EFF must show that the “driving force behind the preparation of each  
 12 requested document” is litigation. *See Nat’l Union Fire Ins. Co. v. Murray Sheet Metal Co.*, 967 F.2d  
 13 980, 984 (4th Cir. 1992); *See generally U.S. v. Richey*, 632 F.3d 559, 567-68 (9th Cir. 2011)  
 14 (discussing the Work-Product Doctrine).

15 The EFF also cannot claim for privilege purposes that its interests are aligned with the  
 16 Defendants and that common interests arise in the Texas litigation and the PTO proceeding.  
 17 Although validity of the ‘504 Patent is an issue in both proceedings, this is where the similarities  
 18 end. *See U.S. v. Austin*, 416 F.3d 1016, 1021 (9th Cir. 2005) (recognizing joint defense privilege as  
 19 also “from one party to the attorney for another party where a joint defense effort or strategy has  
 20 been decided upon and undertaken by the parties and their respective counsel”); *In re Dayco*  
 21 *Corporation Derivative Securities Litigation*, 99 F.R.D. 616, 622 (S.D. Ohio 1983) (the joint  
 22 defense privilege is limited to “disclosure of privileged information by an attorney to actual or  
 23 potential codefendants”); *See also Allendale Mutual Insurance Co. v. Bull Data Systems, Inc.*, 152  
 24  
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1 F.R.D. 132, 140-141 (N.D. Ill. 1993) (“[A] necessary precondition for the common interest doctrine  
2 to apply is that the common interest arise as a result of impending or anticipated litigation”).

3       There is a fundamental difference between being sued for patent infringement and asserting a  
4 validity defense/counterclaim and initiating an IPR to seek invalidation of the patent to pursue a  
5 public interest. The Defendants in the Texas case are simply seeking to prevent having to pay  
6 money to Personal Audio for a license to the patent-in-suit, while the EFF wants to further its aims  
7 to stop “patent trolls” and to “bust patents.” If Personal Audio offered to settle with the Defendants  
8 in the Texas case for nominal amounts or simply dismiss the case in exchange for a dismissal of  
9 their invalidity claims, those Defendants would likely accept it and drop their validity challenge to  
10 the patents. The EFF, however, has nothing to “settle” with Personal Audio and would likely  
11 continue to seek invalidation of the patent to prevent others from becoming potential Defendants in  
12 litigation with Personal Audio. Thus, Defendants and the EFF share no “common interest.”

13       Nevertheless, this argument is inapplicable in this instance where the proceedings are not  
14 substantially the same cause in the same litigation. *See U.S. v. Gonzalez*, 669 F.3d 974, 980 (9th  
15 Cir. 2012) (to assert joint defense privilege, the attorneys need to be “engaged in maintain  
16 substantially the same cause on behalf of other parties in the same litigation”); *Allendale*, 152  
17 F.R.D. at 140 (for the joint defense doctrine to apply, the legal interest must be identical, not  
18 similar); *See DuPlan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1172 (D.S.C. 1974). A  
19 potential alignment of interests is also problematic for the EFF and the Defendants, considering the  
20 estoppel considerations of 35 U.S.C 315(e)(2). Accordingly, the EFF’s work product claims are  
21 without merit.

22       **d. The Subpoena does not require disclosure of unretained expert opinion**

23       Even less persuasive is the EFF’s assertion that its information regarding the invalidity of the  
24 ‘504 Patent is “expert testimony.” *See* Motion at 19. The EFF may believe in an attempt at puffery  
25

1 that it is an “expert,” but this assertion is conclusory at best. *See Hynix Semiconductor Inv. v.*  
2 *Rambus, Inc.*, 2009 WL 230039, at \*10 (N.D. Cal. Jan. 27, 2009) (Whyte, J.) (there are limits to  
3 what constitutes “expert” testimony subject to advance disclosure, written reports, *Daubert*  
4 gatekeeping, and so on. If there were not, patent litigation would be more astronomically expensive  
5 than it already is.”). Topics 6-8 of the Personal Audio subpoena do not rise to the level of “expert”  
6 testimony. All steps taken in order for the EFF to be “fully prepared” to take on Personal Audio is  
7 percipient and based on a November 2, 2013 article by NaturalNews (which expressly states that the  
8 EFF is now “fully prepared” to take on Personal Audio), *see* Chaudhari Decl. at ¶ 13, Exhibit 7, and  
9 does not refer to expert witness testimony. Likewise, identification of any information, non-  
10 privileged analysis, and or communications concerning any alleged prior art of the ‘504 Patent is  
11 also percipient and the EFF has not made any showing that this is expert testimony. In fact, it is  
12 again telling that the EFF has not identified any specific information, communication, or document  
13 that would enable this Court to make this determination. Personal Audio and this Court are left to  
14 speculate as to what communications exist and also draw a line between those that rise to the level  
15 of expert testimony and those that are based on unqualified fact opinion. The court in *Hynix* set  
16 forth a “three-prong inquiry” to determine if something is considered expert testimony. *See id.* at  
17 \*11 (expert testimony, under FRE 702, is required to “(1) be ‘based upon sufficient facts or data,’  
18 (2) result from ‘reliable principles and methods,’ and (3) reflect the reliable application of the  
19 principles and methods to the facts.”). The EFF does not even attempt to meet this three pronged  
20 inquiry and should be required to provided information that is “relevant to any party’s claim or  
21 defense” or “appears reasonably calculated to lead to the discovery of admissible evidence.” The  
22 EFF’s unretained expert opinion argument is, thus, also without merit.

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27 **e. The Subpoena is not an “improper end-run around the strict discovery limits**  
28 **that apply during inter partes review”**

1 The EFF contends that “[s]everal of the Topics, including Topics 3, 4, 6, 7 and 8, are  
 2 attempts to elicit EFF’s litigations positions, and would thus be improper discovery requests during  
 3 an inter partes review.” See Motion at 7. This objection is nonsensical as the discovery sought here  
 4 is for the Texas case, *not* the IPR. In fact, as the EFF points out in the Motion, there is a protective  
 5 order in the Texas case that specifically prevents any discovery in the Texas case being used for  
 6 another proceeding. See Motion at 8. Furthermore, outside counsel such as the undersigned and co-  
 7 counsel Jeremy Pitcock are specifically *prohibited* from having any involvement in the IPR per the  
 8 same protective order. See Declaration of Jeremy S. Pitcock (“Pitcock Decl.”) at ¶ 10; Chaudhari  
 9 Decl. at ¶ 5. As has been discussed earlier in this opposition, Personal Audio seeks this discovery  
 10 for the Texas case, not the IPR. Thus, the subpoena is not an “end-run” around the discovery limits  
 11 of the IPR; rather it is to obtain proper discovery from the EFF, an entity who inserted itself into  
 12 Personal Audio’s district court litigations through a collateral attack on validity.  
 13  
 14

15 **f. The Subpoena does not seek to use information for purposes prohibited by the**  
 16 **protective order in the Texas case**

17 Personal Audio agrees that the protective order in the Texas case restricts use of discovery  
 18 obtained in that case for use in the Texas case only. See Motion at 8. The EFF claims that “counsel  
 19 for Personal Audio has admitted that it is seeking to depose the EFF in order to use that information  
 20 in the PTO action . . . [and] may use information from the deposition in the Massachusetts Case.”  
 21 *Id.* This is wholly untrue.  
 22

23 Counsel for Personal Audio, Jeremy Pitcock, did have a conversation with Ms. Ranieri on  
 24 December 31, 2013. See Pitcock Decl. at ¶ 6. Mr. Pitcock explained that Personal Audio sought to  
 25 take the deposition before certain deadlines in the IPR proceeding and the Massachusetts case. See  
 26 *id.* at ¶ 7. Mr. Pitcock did **not** say that the information was needed for Personal Audio’s response to  
 27 the IPR or in relation to a motion hearing and case management conference in the Massachusetts  
 28

1 case. *See id.* at ¶ 8. Mr. Pitcock did want to complete the deposition because he believed, in good  
2 faith, that the information obtained may very well be useful in the litigation pending in Texas and  
3 elsewhere and wanted to take it earlier rather than later, Mr. Pitcock did not believe that the  
4 deposition was necessary to either of those proceedings, and, in fact despite the refusal of the EFF to  
5 provide a deponent, Personal Audio has had no trouble responding to the various requirements in the  
6 multiple proceedings. *See id.* Additionally, Exhibit 6 to the Ranieri Affidavit shows all of the  
7 correspondence between Mr. Pitcock and Ms. Ranieri, and it shows that the communications were  
8 limited to discovery in the Texas case. *See id.* at ¶ 9.

10 Again, as discussed above, both the undersigned and Mr. Pitcock are prohibited from having  
11 any involvement in the IPR. Both persons have nothing to do with those proceedings. Thus,  
12 without even getting into the question of whether the EFF has standing to challenge an alleged  
13 violation of a protective order to a case it is not a party to, the subpoena does not seek to violate the  
14 Protective Order in the Texas case and such accusations are nothing more than a desperate attempt  
15 to avoid compliance with a proper subpoena.

17 **g. The EFF egregiously attempts to obstruct discovery in litigation on a regular**  
18 **basis**

19 This is not the first time the EFF has attempted to obstruct discovery in litigation. The EFF  
20 routinely seeks to quash subpoenas and help others quash subpoenas. In fact, the EFF maintains a  
21 webpage to guide people in seeking to quash subpoenas. *See* Chaudhari Decl. at ¶ 12, Exhibit 6.  
22 Thus, not only does the EFF seek to obstruct discovery when requests are sent to them, they actively  
23 seek to help individuals across the U.S. obstruct discovery where they have no involvement in those  
24 cases. To the extent proper discovery requests are sent to the EFF, as is the case here, the EFF  
25 should not be permitted to obstruct discovery as per its usual course of conduct—especially not in  
26 this instance where it voluntarily inserted itself into the litigation by launching a collateral attack on  
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1 the patent-in-suit, and in seeking to quash the subpoena, does not provide one piece of authority to  
2 support the notion that a third party who files an IPR is somehow immune to discovery in district  
3 court litigation concerning the same patent.

4 **CONCLUSION**

5  
6 For the reasons set forth above, Personal Audio respectfully requests that the motion to quash  
7 and motion for protective order be denied in all respects.

8  
9 Date: February 18, 2014

Respectfully submitted,

10 /s/ Papool S. Chaudhari

11 Attorney for Plaintiff  
12 PERSONAL AUDIO, LLC  
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**CERTIFICATE OF SERVICE**

I, Papool S. Chaudhari declare as follows:

I am over the age of eighteen years and am not a party to this action. I am a principal of the law firm of Chaudhari Law, PLLC and I am a member of the bar of this Court. I hereby certify that on February 18, 2014, the following document was transmitted via the Court's Electronic Case Filing (ECF) system:

**PLAINTIFF'S OPPOSITION TO THIRD PARTY ELECTRONIC FRONTIER  
FOUNDATION'S MOTION TO QUASH AND FOR PROTECTIVE ORDER**

I further certify that the attached document was sent on February 18, 2014 via the Court's Electronic Case Filing (ECF) system to all counsel of record in this action.

February 18, 2014

Respectfully Submitted,

/s/ Papool S. Chaudhari

ATTORNEY FOR PERSONAL  
AUDIO, LLC.